IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34256

STATE OF IDAHO,	)	**2008 Unpublished Opinion No. 707**
	)	
Plaintiff-Respondent,	)	**Filed: November 13, 2008**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
LARRY LA PINE,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Appellant.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the First Judicial District, State of Idaho, Kootenai County. Hon. Lansing L. Haynes, District Judge.

Judgment of conviction for felony driving under the influence, affirmed.

Molly J. Huskey, State Appellate Public Defender; Heather M. Carlson, Deputy Appellate Public Defender, Boise, for appellant. Heather M. Carlson argued.

Hon. Lawrence G. Wasden, Attorney General; Jennifer E. Birken, Deputy Attorney General, Boise, for respondent. Jennifer E. Birken argued.

PERRY, Judge

Larry LaPine appeals from his judgment of conviction for felony driving under the influence (DUI). For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

LaPine was arrested when he refused to perform field sobriety tests after an officer pulled over his vehicle and observed numerous signs of intoxication. An Alco-Sensor III unit later indicated that his blood-alcohol content (BAC) was .199/.210 percent. Because of his previous record, LaPine was charged with felony driving under the influence, I.C. §§ 18-8004, -05(5), and possession of an open container, I.C. § 23-505. At trial, LaPine requested that the district court give the jury a special verdict form which specifically required that the jurors either unanimously find LaPine guilty of driving with a BAC of .08 percent or greater or unanimously find him guilty of driving under the influence. The district court refused LaPine's special verdict form, reasoning that there was no authority requiring the use of such a verdict form and that it posed a

danger of producing an inconsistent verdict. A jury found LaPine guilty of driving under the influence, but acquitted him of possession of an open container. The district court sentenced LaPine to a unified term of six years, with a minimum period of confinement of one year and six months. LaPine appeals, challenging the district court's ruling denying the use of his special verdict form.

II.
ANALYSIS

LaPine argues that the district court's refusal to present his special verdict form to the jury, which required a separate, unanimous finding that he had either driven with a BAC over .08 or a unanimous finding that he had driven while under the influence, deprived him of his constitutional right to a unanimous verdict. He reasons that these are two separate elements, upon one of which the jury must unanimously agree in order to support a finding of guilt for DUI. The state argues that these are part of the same element required by I.C. § 18-8004[1] and that the jury is only required to make a single, unanimous finding that LaPine either operated his vehicle with a BAC over .08 or that he drove under the influence, not one or the other.

The question whether the jury has been properly instructed is a question of law over which we exercise free review. *State v. Gleason*, 123 Idaho 62, 65, 844 P.2d 691, 694 (1992). When reviewing jury instructions, we ask whether the instructions as a whole, and not individually, fairly and accurately reflect applicable law. *State v. Bowman*, 124 Idaho 936, 942, 866 P.2d 193, 199 (Ct. App. 1993).

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[1] Idaho Code Section 18-8004 provides, in pertinent part:

> (1)(a) It is unlawful for any person who is under the influence of alcohol . . . or who has an alcohol concentration of 0.08 . . . to drive or be in actual physical control of a motor vehicle within this state . . . .
>
> . . . .
>
> (2) . . . Any person who does not take a test to determine alcohol concentration or whose test result is determined by the court to be unreliable or inadmissible against him, may be prosecuted for driving or being in actual physical control of a motor vehicle while under the influence of alcohol, drugs, or any other intoxicating substances, on other competent evidence.

This Court has previously held that I.C. § 18-8004 establishes one offense--driving under the influence--and that a prosecutor may rely either on BAC test results or observable conditions of the driver to prove the requisite criminal element. *See, e.g., State v. Ferreira*, 133 Idaho 474, 482, 988 P.2d 700, 708 (Ct. App. 1999); *State v. Barker*, 123 Idaho 162, 163-64, 845 P.2d 580, 581-82 (Ct. App. 1992); *State v. Hartwig*, 112 Idaho 370, 375, 732 P.2d 339, 344 (Ct. App. 1987). Idaho appellate courts have also previously addressed the issue of juror unanimity when a statute proscribes multiple methods of accomplishing a single criminal offense. *See State v. Nunez*, 133 Idaho 13, 18-19, 981 P.2d 738, 743-44 (1999); *Downing v. State*, 136 Idaho 367, 372-74, 33 P.3d 841, 846-48 (Ct. App. 2001). In *Nunez*, the defendant argued that the district court erred by refusing a jury instruction that would have required unanimous agreement as to the underlying act upon which his conviction for misuse of public funds was based. The Idaho Supreme Court held:

> Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict. *Schad v. Arizona*, 501 U.S. 624, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991), *citing McKoy v. North Carolina*, 494 U.S. 433, 449, 110 S. Ct. 1227, 1236-37, 108 L. Ed. 2d 369 (1990) (Blackmun, J., concurring). Under Idaho Code § 18-5701, a defendant can be found guilty of misuse of public money for any number of acts proscribed. The statute provides alternative means of satisfying the *actus reus* element of the single offense of misuse of public money.
>
> In Nunez' case, the jury was instructed that it had to find beyond a reasonable doubt that sometime between 1990 and 1995 Nunez had either appropriated money to his own use or failed to keep money in his possession until paid out as authorized by law. The jury was also instructed that its verdict had to be unanimous and that it was to consider each count separately and reach a verdict uninfluenced by its decision on any other count. We presume that the jury followed the court's instructions in concluding unanimously that Nunez was guilty of the crime, not the underlying facts that establish the elements of the crime.

Nunez, at 19, 981 P.2d at 744. In *Downing*, a post-conviction case, the defendant argued ineffective assistance of counsel for failure to request a jury instruction distinguishing between two methods of inappropriate sexual conduct included under the offense of lewd or lascivious conduct with a minor under the age of sixteen. This Court held:

> Under [I.C. § 18-1508], Downing was charged with a single count of lewd conduct involving manual-genital and/or genital-genital contact with the victim. Downing would be just as guilty of lewd conduct through manual contact as he would be through genital contact. The prohibited acts are merely alternative

> means by which a defendant (Downing) may be held criminally liable for the offense of lewd conduct.

Downing, at 373, 33 P.3d at 847.

In this case, LaPine was charged with DUI. Similar to the offense of lewd conduct analyzed in *Downing*, "I.C. § 18-8004 provides for one crime, with two alternative methods of proof." *Ferreira,* 133 Idaho at 482, 988 P.2d at 708. Therefore, this offense could be proven by either showing that he had a BAC of .08 percent or greater or by observable evidence of his intoxication. LaPine would be guilty of DUI regardless of which method the jury found. As in *Downing*, these are merely alternative means whereby a defendant can commit the offense of DUI. There was no requirement that the jury reach a unanimous finding as to the factual issues that underlie its unanimous guilty verdict for DUI. Therefore, the district court did not err by refusing to provide the jury with LaPine's proposed special verdict form requiring a unanimous factual finding of the method whereby LaPine violated the statute.

Next we address LaPine's contention that it is unconstitutional for him to be convicted of DUI without the jury unanimously agreeing as to which theory. In *Schad*, a capital murder case, the United States Supreme Court addressed jury unanimity on different elements of one crime and held:

> We have never suggested that in returning general verdicts in such cases the jurors should be required to agree upon a single means of commission, any more than the indictments were required to specify one alone. In these cases, as in litigation generally, "different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict."

Schad, 501 U.S. at 631-32, *quoting McKoy*, 494 U.S. at 449 (Blackmun, J., concurring) (footnotes omitted). We find the reasoning of *Schad* and *McKoy* to be controlling in this case. There is no constitutional mandate of juror unanimity for underlying factual elements of a crime. Therefore, whether we decide this case as a constitutional matter or a matter of statutory construction, the result is the same.

III.
CONCLUSION

Idaho Code Section 18-8004 creates two methods of proving the singular offense of DUI. The jury was not required to unanimously decide the specific method by which LaPine had

violated the statute. Furthermore, the jury was not constitutionally required to make such a unanimous finding. Therefore, the district court did not err in refusing his proposed special verdict form. Thus, LaPine's judgment of conviction for felony DUI is affirmed.

Chief Judge GUTIERREZ and Judge LANSING, **CONCUR.**